

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FIDEL ESPARZA)	
Claimant)	
VS.)	
)	
NATIONAL BEEF PACKING COMPANY)	Docket No. 239,452
Respondent)	
AND)	
)	
WAUSAU INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the May 10, 2000 Decision and the May 17, 2000 Order Nunc Pro Tunc entered by Administrative Law Judge Pamela J. Fuller. The Appeals Board heard oral argument on September 20, 2000.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Decision.

ISSUES

This is a claim for a right arm injury that allegedly occurred as the result of a series of mini-traumas from June 1, 1998, through October 27, 1998. The parties stipulated that October 27, 1998, should be used as the date of accident for purposes of computing the award.

In the May 10, 2000 Decision and the May 17, 2000 Order Nunc Pro Tunc, which are the subject of this appeal, Judge Fuller awarded claimant permanent partial disability benefits for a 17 percent functional impairment to the right upper extremity.

Respondent and its insurance carrier contend Judge Fuller erred. They argue that the award should have been reduced by 50 percent because Dr. Dirk Alander indicated that 50 percent of the arthritis in claimant's elbow probably preexisted the alleged series of accidents. Conversely, claimant argues that the Judge should have averaged Dr. Pedro Murati's 23 percent functional impairment rating with Dr. Alander's 17 percent rating and, therefore, the Judge should have awarded claimant a 20 percent permanent partial disability.

The only issues before the Appeals Board on this review are:

1. What is the nature and extent of claimant's injury?
2. Should the permanent partial disability rating be reduced because of a preexisting impairment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. After reviewing the entire record and considering the parties' arguments, the Appeals Board finds and concludes that the Decision and Order Nunc Pro Tunc should be affirmed.
2. The Appeals Board affirms the Judge's finding that claimant sustained a 17 percent functional impairment to the right upper extremity as a result of the repetitive use injury that he sustained while working for respondent. That functional impairment rating was provided by Dr. Dirk Alander, a board-certified orthopedic surgeon with the University of Missouri-Kansas City School of Medicine. Dr. Alander saw claimant in November 1999 after being selected by the Judge to conduct an independent medical evaluation. The Appeals Board agrees with Judge Fuller that, in this instance, Dr. Alander's opinions are persuasive and should be adopted in determining claimant's functional impairment rating.
3. Respondent and its insurance carrier argue that claimant's permanent partial disability rating should be reduced because of a functional impairment that allegedly existed when claimant returned to work for respondent in either January or February 1998. Respondent and its insurance carrier contend that claimant had arthritis in his right elbow that contributed 50 percent to the ultimate condition that the doctors rated.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes

increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.¹

The Appeals Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident, which in this instance occurred between approximately June and October 27, 1998. The statute does not require that the functional impairment was actually rated or that the individual was given formal medical restrictions. It is critical that the preexisting condition actually constituted an impairment in that it somehow limited the individual's abilities or activities. An unknown, asymptomatic condition that is neither disabling nor otherwise constitutes an impairment cannot serve as a basis to reduce an award under the above statute.

The Board concludes that the evidence fails to establish that claimant had any symptoms, limitations, or impairment before the alleged period of accident and, therefore, the 17 percent permanent partial disability rating should not be reduced. Although claimant probably had arthritis in his elbow before the period of accident, that evidence standing alone does not establish that the condition was either symptomatic or disabling, or that it impaired claimant in some manner.

4. The Appeals Board adopts the findings and conclusions set forth in the Decision and the Order Nunc Pro Tunc that are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board affirms the May 10, 2000 Decision and the May 17, 2000 Order Nunc Pro Tunc.

IT IS SO ORDERED.

Dated this ____ day of September 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹ K.S.A. 1998 Supp. 44-501(c).

c: Chris A. Clements, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director